

APPEAL NO. 052658  
FILED JANUARY 18, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 1, 2005. The hearing officer resolved the disputed issues by deciding that the \_\_\_\_, compensable injury does not extend to or include major depressive disorder, chronic pain disorder, myofascial pain syndrome, or right lumbar (L4) radiculopathy and that the respondent (carrier) has not waived the right to contest the compensability of the right lumbar L4 radiculopathy, as no such injury exists. The appellant (claimant) appealed, disputing both the extent of injury and waiver determinations. The carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that he worked as a service technician for the employer and was injured when the cable he was pulling snapped. He testified that as he caught himself, he felt a burn go up and down his spine. The parties stipulated that on \_\_\_\_, the claimant sustained a compensable injury.

EXTENT OF INJURY

Whether or not the compensable injury extended to major depressive disorder, chronic pain disorder, myofascial pain syndrome, and right lumbar (L4) radiculopathy was an issue in dispute at the CCH. Because the L4 radiculopathy is also specifically at issue regarding waiver, it will be discussed below. There is conflicting evidence with regard to whether the claimant's compensable injury includes major depressive disorder, chronic pain disorder, and myofascial pain syndrome. The claimant contends that the evidence that supports his position with regard to the extent-of-injury issue is overwhelming. The hearing officer determined that the compensable injury does not include major depressive disorder, chronic pain disorder, and myofascial pain syndrome. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determination against the claimant on the issue of the extent of the compensable injury regarding major depressive disorder, chronic pain disorder, and myofascial pain syndrome is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

## WAIVER

The second disputed issue at the CCH was whether the carrier waived the right to contest compensability of the right lumbar L4 radiculopathy by not timely contesting the injury in accordance with Section 409.021. The hearing officer based his waiver determination on his finding that the claimant did not suffer from L4 radiculopathy. However, the hearing officer noted in the Background Information that “[t]he carrier conceded that the diagnosis of L-4 radiculopathy was known to or discoverable by the carrier within 60 days of [its] original notice of the claimed injury, and no dispute was filed within 60 days of the notice date.” The carrier acknowledged in its opening statement that the injury up to the date of the CCH was limited to a low back injury.

Section 409.021, effective for a claimed compensable injury that occurred before September 1, 2003, provides that an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Texas Department of Insurance, Division of Workers’ Compensation and the employee in writing of its refusal to pay benefits. In Appeals Panel Decision (APD) 030380-s, decided April 10, 2003, the Appeals Panel noted that in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the Texas Supreme Court stated: “Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability.”

It was undisputed that the carrier received first written notice of the injury on July 16, 2001. The first dispute of the carrier in evidence was dated outside the 60-day period. It was unclear from the evidence presented whether or not the carrier took some action within the 7 day waiver period by filing a “cert-21” or by beginning payment of benefits in accordance with the 1989 Act. In evidence was a medical record dated July 20, 2001, 4 days after the carriers first written notice of injury which noted in the impression section that the nerve conduction tests revealed right L4 radiculopathy and that the record was forwarded to the carrier. Additionally, an EMG of the claimant dated July 20, 2001, is in evidence which revealed an abnormal study with electrodiagnostic evidence of right L4 radiculopathy. It is clear from the evidence presented that the carrier had notice that the claimant’s low back injury may include L4 radiculopathy within 7 days of its first written notice of injury. The hearing officer determined that the carrier has not waived the right to contest the compensability of the right lumbar L4 radiculopathy, as no such injury exists. This was legal error. Both parties acknowledge that Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) is not applicable to the facts of this case. The carrier argues that radiculopathy is not an injury that can be waived, especially when such a finding is transient at best. The nature of the injury that becomes compensable by virtue of waiver is defined by the information that could have been reasonably discovered by the carrier’s investigation prior to the expiration of the waiver period. See APD 041738-s, decided September 8, 2004. The waiver issue in dispute at the CCH was limited to L4 radiculopathy. The evidence reflects that information which identified possible L4 radiculopathy could have been reasonably discovered by the carrier’s investigation prior to the expiration of the waiver period. Therefore, the hearing officer’s determination that

the carrier has not waived the right to contest the compensability of the right lumbar L4 radiculopathy, as no such injury exists is reversed and a new decision is rendered that the carrier has waived the right to contest the compensability of the right lumbar L4 radiculopathy. The L4 radiculopathy has therefore become compensable as a matter of law. Therefore, the determination that the \_\_\_\_, compensable injury does not extend to include right lumbar (L4) radiculopathy is reversed and a new decision is rendered that the compensable injury includes right lumbar (L4) radiculopathy. We affirm the determination that the \_\_\_\_, compensable injury does not extend to or include major depressive disorder, chronic pain disorder, and myofascial pain syndrome.

The true corporate name of the insurance carrier is **SOUTHERN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MAC SHIPMAN  
10535 BOYER BOULEVARD, SUITE 100  
AUSTIN, TEXAS 78758.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge